34

No. 05-380

FILED
MAY 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES,
ATTORNEY GENERAL,

Petitioner,

v.

LEROY CARHART, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICI CURIAE* PRO-LIFE LEGAL DEFENSE FUND, ALLIANCE DEFENSE FUND, CHRISTIAN LEGAL SOCIETY, CHRISTIAN MEDICAL ASSOCIATION, CONCERNED WOMEN FOR AMERICA, AND NATIONAL ASSOCIATION OF EVANGELICALS, IN SUPPORT OF PETITIONER

PHILIP D. MORAN
COLBE MAZZARELLA
265 Essex St., Suite 202
Salem, MA 01970
(978) 745-6085

GREGORY S. BAYLOR
STEVEN H. ADEN
CENTER FOR LAW & RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Suite 300
Springfield, VA 22151
(703) 642-1070 ext. 3504

DWIGHT G. DUNCAN
Counsel of Record
333 Faunce Corner Rd.
N. Dartmouth, MA 02747
(508) 998-9600 ext. 124

MARY ANN GLENDON
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4769

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT OF APPEALS ERRED BY CONFLATING *STENBERG*'S FACTUAL FINDINGS WITH ITS CONSTITUTIONAL HOLDINGS. 4

A. Conflating *Stenberg*'s Constitutional Rules With Its Factual Findings Would Turn The Court Into A Super Regulatory Agency. 6

B. *Stenberg* Includes Both A Core Constitutional Holding And Specific Factual Findings Based On The Record In That Case. 7

II. THE ACT SATISFIES THE CONSTITUTIONAL HOLDINGS ANNOUNCED BY THIS COURT IN *CASEY* AND *STENBERG*. 9

A. The Trial And Congressional Records Demonstrate That No Health Exception Is Necessary For Bans On The D&X Procedure. 10

1. The congressional record shows there is no substantial medical authority that demands a health exception. 10

2. The trial record provides further support for Congress's findings. 15

3. If the Court nevertheless perceives some rare circumstance in which it believes the D&X procedure is medically necessary, the proper course is not wholesale invalidation of the Act, but entry of a limiting injunction. 16

B. The Act applies only to the D&X procedure and thus does not impose an undue burden upon a woman's right to make an abortion decision. 17

1. The Act is limited by its terms to the D&X procedure. 17

2. Even if the Act is ambiguous, the Court should avoid the constitutional question by reading the Act to apply only to the D&X procedure. 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Agostini v. Felton,
521 U.S. 203 (1997) 1

Ashwander v. TVA,
297 U.S. 288 (1936) 20

Ayotte v. Planned Parenthood of Northern New England, 126 S. Ct. 961 (2006) 16, 17, 21

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 7

Carhart v. Ashcroft,
331 F. Supp. 2d 805
(D. Neb. 2004) 15, 16, 19

Carhart v. Gonzales,
413 F.3d 791 (8th Cir. 2005) 3, 5, 6

City of Akron v. Akron Ctr. for Reprod. Health,
462 U.S. 416 (1983) 8

City of Boerne v. Flores,
521 U.S. 507 (1997) 5

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 1

Dale v. Boy Scouts of America,
530 U.S. 640 (2000) 1

Edward J. DeBartolo Corp. v. Fla. Gulf Coast
Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 20

Good News Club v. Milford Central Schools,
533 U.S. 98 (2001) 1

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 8

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 9

Mitchell v. Helms, 530 U.S. 793 (2000) 1

Nat'l Abortion Fed'n v. Gonzales,
437 F.3d 278 (2d Cir. 2006) 7

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 1

NLRB v. Catholic Bishop of Chi.,
440 U.S. 490 (1979) 20

Planned Parenthood of Southeastern
Pennsylvania v. Casey,
505 U.S. 833 (1992) ..... *passim*

Richmond Med. Ctr. for Women v. Hicks,
409 F.3d 619 (4th Cir. 2005) 6

Stenberg v. Carhart,
530 U.S. 914 (2000) ..... *passim*

Troxel v. Granville,
530 U.S. 57 (2000) 1

Vacco v. Quill,
521 U.S. 793 (1997) 1

Washington v. Glucksberg,
521 U.S. 702 (1997) 1

CONSTITUTIONAL PROVISIONS AND CODES:

Fourteenth Amendment 6

18 U.S.C. § 1531(b)(1)(A)–(B) 18

MISCELLANEOUS:

§ 2(14)(A), 117 Stat. at 1204 10
§ 2(14)(B), 117 Stat. at 1204 10
§ 2(14)(O), 117 Stat. at 1206 10

149 Cong. Rec. S3653-54 14
H.R. Rep. No. 108-58, (2003) 4, 10, 11, 14, 21
H.R. 1122, 105th Cong. (1997) 18
Pub. L. No. 108-105, 117 Stat. 1201 4

Neb. Rev. Stat. § 28-326(9) 17

Partial-Birth Abortion Ban Act of 1995:
Hearings on H.R. 833 Before the S.
Comm. on the Judiciary, 104th Cong.
(Nov. 17, 1995) 10, 12, 14

Partial-Birth Abortion Ban Act of 2002: Hearing
on H.R. 4965 Before the Subcomm. on
the Constitution of H. Comm. on the
Judiciary, 107th Cong. 69–70 (2002) 18-19

Janet E. Gans Epner et al., Late Term Abortion, 280 J. Amer. Med. Ass'n 724 (Aug. 26, 1998) 12

INTEREST OF *AMICI CURIAE*[1]

The Pro-Life Legal Defense Fund, Inc. ("PLLDF"), is a Massachusetts not-for-profit corporation that provides *pro bono* legal services for the protection of human life. The PLLDF strongly opposes the partial-birth abortion procedure.

Alliance Defense Fund ("ADF") is a not-for-profit public interest law firm that litigates right-to-life cases and provides strategic planning, training, and funding to attorneys and organizations in defense of the sanctity of human life. ADF pursues its mission directly and in cooperation with hundreds of allied attorneys and numerous public interest law firms. ADF has advocated for the constitutional rights of Americans in hundreds of significant cases throughout the United States, having been directly or indirectly involved in well over 600 legal matters, including cases before the U.S. Supreme Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and most law schools. Since 1975, the Society's legal advocacy division, the Center for Law and Religious

---

[1] Counsel for both parties have consented to the filing of this *amicus* brief. Their written consents are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part.

Freedom, has worked for the protection of human life from conception to natural death.

The Christian Medical Association ("CMA") was founded in 1931 and today represents over 16,000 members—primarily practicing physicians representing the entire range of medical specialties. These members share a common commitment to the principles of biblical faith and the integration of those principles with professional practice. Among other functions, the CMA Medical Ethics Commission coordinates member experts in the field of medical ethics who formulate positions on vital issues. These positions are subsequently voted upon for adoption, amendment, or rejection by over 100 elected representatives to the national convention of the Association. CMA's members have an interest in the case before the Court because they oppose the practice of abortion and urge the active development and employment of alternatives.

Concerned Women for America ("CWA") is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state and local legislatures and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, the academic community, business leaders and the general public about marriage, family, cultural and constitutional issues that affect the nation. CWA has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts and state courts.

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals. It includes some 45,000 churches from 59 denominations and serves a constituency of approximately 30 million people. NAE is committed to

defending the right to life as a precious gift of God and a vital component of the American heritage.

SUMMARY OF ARGUMENT

In reaching its decision in *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), the Court of Appeals for the Eighth Circuit departed from this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Rather than distinguishing between the *Stenberg* Court's constitutional holdings and factual findings, the court of appeals chose instead to treat the *Stenberg* Court's factual findings as a *per se* constitutional rule. This expansive interpretation reveals a fundamental misunderstanding of this Court's abortion jurisprudence.

In *Stenberg*, this Court's constitutional holding was that an abortion procedure ban must contain a health exception when substantial medical authority supports the proposition that the ban could endanger women's health. *See Stenberg*, 530 U.S. at 938. By contrast, the *Stenberg* Court's factual finding was that the Nebraska statute in question did not satisfy the aforementioned constitutional rule because Nebraska had not convinced this Court that a health exception is never necessary to preserve the health of women. *See id.* at 937-38.

The Eighth Circuit failed to make this critical distinction. In doing so, despite the fact that the record presented here is significantly different from and more expansive than the record reviewed by the *Stenberg* Court, the court of appeals did not give the United States a chance to convince it that a ban on D&X in no way endangers women's health. This fundamental error also allowed the Eighth Circuit to avoid analyzing the question of whether the Act imposes an undue burden on women. This Court

should not sanction such a departure from its precedents.

The congressional record and trial court record presented in this case overwhelmingly support Congress's factual finding that the Act in no way endangers women's health. As such, and because (unlike the Nebraska statute in *Stenberg*) the Act bans only the D&X procedure, it satisfies both prongs of the test announced by this Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Stenberg* – namely, the undue burden standard and the health exception requirement. Accordingly, this Court should reverse the Eighth Circuit's decision and uphold the Act. Following this course of action is no departure from *Casey* and *Stenberg*, but simply a straightforward application of their holdings.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY CONFLATING *STENBERG*'S FACTUAL FINDINGS WITH ITS CONSTITUTIONAL HOLDINGS.

In the aftermath of *Stenberg*, and after further hearings and debate, Congress passed and the President signed the Partial-Birth Abortion Ban Act of 2003. Pub. L. No. 108-105, 117 Stat. 1201 [hereinafter the Act]. In passing the Act, Congress sought to remedy the deficiencies identified in the Nebraska statute by the *Stenberg* Court. *See* H.R. Rep. No. 108-58, at 6 (2003) (explaining that the "definitional objections have been remedied" by drafting the Act's language "sufficiently precise[ly] so as to exclude the D&E abortion procedure"); *see also id.* at 9 (noting that Congress made "extensive findings on the lack of evidence [supporting] the medical efficacy or safety of the [D&X] procedure as well as the

potential dangers posed by the procedure" in order to satisfy the *Stenberg* test). Having done so, Congress believes the Act is constitutional because it satisfies the two independent constitutional requirements for abortion regulations announced by this Court in *Casey* and *Stenberg* – namely, that the statute must, first, not impose an undue burden upon a woman's right to make an abortion decision, and second, contain a health exception if "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health." *Stenberg*, 530 U.S. at 938, 945-46.

The Court of Appeals for the Eighth Circuit disagreed with Congress's conclusions, holding the Act unconstitutional because it does not contain the health exception required under *Stenberg*. *See Carhart*, 413 F.3d at 803-04. In particular, the court reasoned that "[n]either it, nor Congress, [is] free to disagree with the Supreme Court's determination [in *Stenberg*] because the Court's conclusions are final on matters of constitutional law." *Id.* at 800. In so doing, the Eighth Circuit incorrectly treated the *Stenberg* Court's *factual findings* as a "per se constitutional rule" precluding all factual development in the "specific context of a ban on partial-birth abortions." *Id.*

In reaching its conclusion, the Eighth Circuit was unquestionably correct that lower courts and Congress cannot overrule this Court's interpretations of the Constitution. *See City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997). Here, however, Congress simply made a different *factual finding*, based on a different and more extensive record than the *Stenberg* Court had before it. Indeed, the Eighth Circuit itself recognized that the medical necessity of a health exception is a question of legislative fact. *See Carhart*, 413 F.3d at 800. But it did not treat the question as one of fact; instead, the court essentially concluded

that it was unnecessary to review the factual record at all, even though that record is significantly different from the record in *Stenberg*. In so concluding, the Eighth Circuit erred.

A. *Stenberg* Includes Both A Core Constitutional Holding And Specific Factual Findings Based On The Record In That Case.

The constitutional interpretation in *Stenberg* was that the Due Process Clause of the Fourteenth Amendment requires all abortion procedure bans to include a health exception "where substantial medical authority supports the proposition that [such a ban] could endanger women's health." *Stenberg*, 530 U.S. at 938. By contrast, the factual finding in *Stenberg* was that Nebraska presented insufficient evidence to demonstrate that the D&X procedure is never medically necessary. *See id.* at 937-38. The Eighth Circuit failed to make this distinction; it failed to distinguish between the *constitutional* question – on which this Court undoubtedly has final say – and the *factual* question – on which, as discussed below, this Court has traditionally afforded Congress substantial deference. The health exemption analysis involves the latter question, not the former. *See id.* at 931-32 (identifying the need for a health exception as a "*factual* question") (emphasis added); *see also Carhart*, 413 F.3d at 800 ("[T]he medical necessity of a health exception is a question of *legislative fact*... " (emphasis added)). And this Court in *Stenberg* did not hold that its factual findings concerning the need for a health exception are enshrined in the Constitution. *Cf. Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 630 (4th Cir. 2005) (Niemeyer, J., dissenting) (recognizing that a *per se* rule regarding the *Stenberg* Court's factual findings "fails to take into account the nature of the Nebraska statute under consideration in

[*Stenberg v.*] *Carhart*, the factual findings on which the Supreme Court based its opinion, and the reach of the Supreme Court's actual holding").

Whereas *Stenberg* held simply that "*Nebraska* ha[d] not convinced [it] that a health exception [to a partial-birth abortion ban] is never necessary to preserve the health of women," *Stenberg*, 530 U.S. at 937-38 (emphasis added) (internal quotation marks omitted), the Eighth Circuit, by declaring the Act unconstitutional *per se*, did not even give the United States a chance to convince it that a ban on partial-birth abortions does not endanger women's health. Instead, the court of appeals simply created a *per se* rule with regard to *Stenberg*'s factual findings, disregarded Congress's findings, and then struck down the Act in its entirety. This Court should not sanction such a departure from its precedents. We urge this Court to reverse the court of appeals' misinterpretation and misapplication of *Stenberg*.

B. Conflating *Stenberg*'s Constitutional Rules With Its Factual Findings Would Turn The Court Into A Super Regulatory Agency.

The trial records in this and similar abortion cases demonstrate that, by conflating *Stenberg*'s constitutional rules with its factual findings, "the federal courts have been transformed into a sort of super regulatory agency – a role for which courts are institutionally ill-suited and one that is divorced from accepted norms of constitutional adjudication." *Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278, at 296 (2d Cir. 2006) (Walker, J., concurring). Many members of the Court have long cautioned against such a role for the federal courts. For instance, in his dissent in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), Justice Breyer, joined by

Justices Stevens, Souter, and Ginsburg, stressed this point:

> Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, [certain actions] amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have firsthand experience with [the] related issues.

Id. at 384-85 (Breyer, J., dissenting). C*f. City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 456 n.4 (1983) (O'Connor, J., dissenting) ("Irrespective of the difficulty of the task [of determining whether the effect of a particular abortion regulation departs from accepted medical practice], legislatures, with their superior factfinding capabilities, are certainly better able to make the necessary judgments than are courts.").

Of course, this Court must not abdicate its solemn responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But this judicial mandate implicitly recognizes its own constraints. Chief Justice Marshall himself stressed the limited role that the federal courts play. He emphasized that it is "the province and duty of the judicial department to say what the *law* is." *Id.* (emphasis added). He did not say that it is the province and duty of the judicial department to say what the state of medical authority is. Indeed, he, like

the Founders, warned against the judiciary becoming involved in such matters. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) ("[Inquiring into the necessity of laws] would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."); The Federalist No. 78 (Alexander Hamilton) ("The courts must declare the sense of the *law*; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would . . . be the substitution of their pleasure to that of the legislative body." (emphasis added)).

This Court should heed Chief Justice Marshall's advice by reversing the Eighth Circuit's decision and allowing Congress – a branch with far superior factfinding capabilities, and the branch assigned the role of making policy determinations in this area – to decide whether the D&X procedure is, in fact, medically necessary. As discussed below, Congress has made the factual determination that the D&X procedure is not necessary, and has presented its countless findings in a clear and convincing manner. This Court should respect those factual findings.

II. THE ACT SATISFIES THE CONSTITUTIONAL HOLDINGS ANNOUNCED BY THIS COURT IN *CASEY* AND *STENBERG*.

The Act is constitutional because it satisfies the two-prong test set forth in *Casey* and *Stenberg*. First, the Act bans only the D&X procedure – a procedure that, based on substantial medical authority presented at numerous congressional hearings, is never necessary to protect women's health. As a result, no health exception is required under *Casey* and *Stenberg* Second, although the Eighth Circuit did not reach this issue, the Act also does not impose an undue burden because its plain language bans

only the D&X procedure. Accordingly, *Casey* and *Stenberg* require reversal of the Eighth Circuit's decision.

A. The Trial And Congressional Records Demonstrate That No Health Exception Is Necessary For Bans On The D&X Procedure.

1. The congressional record shows there is no substantial medical authority that demands a health exception.

In assessing the need for a health exception in the Act, Congress held extensive legislative hearings during the 104th, 105th, 107th, and 108th Congresses, *see* H.R. Rep. No. 108-58, at 12-14 (2003), culminating in the finding that "partial-birth abortion is never medically indicated to preserve the health of the mother." Act, § 2(14)(O), 117 Stat. at 1206. Among its auxiliary findings, Congress determined that "[t]here is no credible medical evidence that partial-birth abortions are safe or safer than other abortion procedures." *Id.* § 2(14)(B), 117 Stat. at 1204. Moreover, Congress found that "[p]artial birth abortion poses serious risks to the health of a woman undergoing the procedure." *Id.* § 2(14)(A), 117 Stat. at 1204.

The congressional record strongly supports these findings. First, Congress found a lack of credible medical evidence discussing the relative safety of D&X and alternative procedures. Dr. Nancy Romer testified that "[t]here is simply no data anywhere in the medical literature in regards to the safety and efficacy [of partial-birth abortion]." Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 833 Before the S. Comm. on the Judiciary, 104th Cong. (Nov. 17, 1995) (Statement of Dr. Nancy Romer). Congress further

relied on two published articles in a leading medical periodical addressing the D&X procedure, both of which "noted the lack of credible studies regarding the safety of the procedure." H.R. Rep. No. 108-58, at 15 n.72. The American Medical Association (AMA) informed Congress that the "D&X procedure is not even an accepted medical practice." *Id.* at 15 (internal quotation marks omitted). Congress also relied on an interview given by American College of Obstetricians and Gynecologists (ACOG) President Fredric D. Frigoletto, Jr., in which he stated that "[t]here are no data to say that one of the procedures [intact D&X or D&E] is safer than the other." *Id.* at 16 n.80.

In this regard, Congress also reviewed testimony given by Dr. Frank Boehm, an expert on abortion. Dr. Boehm "testified that he did not know of any situations in which an intact D&X abortion procedure would be a safer abortion procedure for a woman than an alternative procedure." *Id.* at 14 n.70 (internal quotation marks omitted). Similarly, Dr. Phillip Stubblefield, also an expert on abortion, stated that "there are no medical studies which compare the safety of the intact D&X to other abortion procedures or conclude that the D&X is safer than other abortion procedures." *Id.* at 15 n.72 (internal quotation marks omitted).

Second, having concluded that there is no credible medical evidence comparing the safety of the D&X procedure to other available procedures, Congress turned its attention to determining whether the D&X procedure itself poses significant risks to women. Congress concluded that it does: "The fact of the matter is that the mainstream medical community has rejected the partial-birth abortion procedure because of concerns about its safety." *Id.* at 18. In reaching this conclusion, Congress received testimony from Dr. Warren Hern, a physician who specializes in late-term abortions and the author of the nation's most widely

used textbook on abortion standards and procedures. Dr. Hern testified that he had "very serious reservations about the procedure" and that "he could not imagine a circumstance in which this procedure would be the safest." *Id.* (quoting Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 833 Before the S. Comm. on the Judiciary, 104th Cong. (Nov. 17, 1995) (Statement of Dr. Warren Hern)). Dr. Hern indicated specifically that the act of turning the fetus to a breech position – an act necessary to perform a partial-birth abortion – is potentially dangerous because it could cause amniotic fluid embolism or placental abruption. *See id.* at 19 n.95.

Congress further reviewed evidence showing that "physicians have suggested that the procedure may increase complications, such as cervical incompetence." *Id.* at 18 n.94 (quoting Janet E. Gans Epner et al., *Late Term Abortion*, 280 J. Amer. Med. Ass'n 724, 726 (Aug. 26, 1998)). Congress also received evidence indicating that the partial-birth abortion procedure poses several additional risks, such as uterine rupture, iatrogenic lacerations, and secondary hemorrhaging. *See id.* at 18-19.

Third, after finding that the D&X procedure poses substantial risks to women's health, Congress made further findings to ensure that banning the procedure would not endanger women's health. In this regard, Congress specifically considered the need for a health exception in the Act. *See id.* at 27 (indicating that "[a]n amendment . . . to add an exception for partial-birth abortions performed to preserve the health of the mother . . . was defeated . . . ."). In reaching the conclusion that the D&X procedure is never medically necessary, Congress relied on statements by Dr. Hern indicating that he "would dispute any statement that [D&X] is the safest procedure to use." *Id.* at 18. Similarly, Dr. Boehm concluded that a ban on partial-birth abortion will not force a woman seeking an

abortion to undergo an "alternative procedure which would create a higher risk of harm . . . ." *Id.* at 20. As Dr. Boehm astutely indicated, abortionists have "been performing abortions for years on women *safely with other techniques*, and we don't have any data that would say that another technique such as partial-birth abortion is any safer." *Id.* (emphasis added).

Moreover, although the AMA opposes the Act because of its criminal sanctions, the AMA has not wavered from its position that the partial birth abortion procedure is never medically necessary. *See id.* at 16. As early as 1997, and still today, the AMA has made clear that "there are safe, and indeed safer, abortion alternatives [to the D&X procedure]." *Id.* at 16 n.78. Indeed, the "AMA's expert panel, which included an ACOG representative, could not find any identified circumstance where [D&X] was the only appropriate alternative." *Id.* at 16 n.76 (internal quotation marks omitted). Similarly, "a select panel convened by ACOG could identify no circumstance under which this [D&X] procedure . . . would be the only option to save the life or preserve the health of the woman." *Id.* at 16 (alteration and omission in original). And Dr. Nancy W. Dickey, Chair of the AMA Board of Trustees, stated that the Act bans "a procedure which is never the only appropriate procedure." *Id.* at 16 n.78.

Additionally, Congress took note of the fact that Dr. Martin Haskell, the physician credited with developing the D&X procedure, has testified that he has never encountered a situation in which the procedure was medically necessary. *See id.* at 17 & n.83. Lending further support to these findings, Dr. Pamela Smith, the Director of Medical Education in the Department of Obstetrics and Gynecology at Mt. Sinai Hospital, informed Congress that "[t]he only interest served by the partial-birth abortion procedure is the 'convenience' of the abortionist." *Id.* at 17 n.82

(quoting Partial-Birth Abortion Ban Act of 1995: Hearings on H.R. 833 Before the S. Comm. on the Judiciary, 104th Cong. (Nov. 17, 1995) (Statement of Dr. Pamela Smith)); *cf.* 149 Cong. Rec. S3458 (daily ed. Mar. 11, 2003) (statement of Sen. Frist) (providing medical reasons for refuting the "myth" that a partial-birth abortion is necessary to preserve the health of women and indicating that "the only advantage . . . of partial-birth abortion . . . is the guarantee . . . of a dead infant"). Similarly, there was evidence from Kansas, the only state to require physicians to report the performance of partial-birth abortions, indicating that each of the 240 partial-birth abortions performed in Kansas in 1998 and 1999 was on a viable baby and not one was necessary to protect the physical health of the mother. *See id.* at 17 n.86.

To be sure, not everyone supports Congress's findings. But the views of the dissenters in no way discredit or negate Congress's factual findings – and any conclusion that they do is clearly erroneous. The dissenting views indicate merely that some people, and particularly those with a financial interest in seeing the practice continue, argue that D&X is necessary – either because it is more convenient than alternative procedures, because they can conceive of some scenario in which D&X is arguably marginally safer than already safe alternatives, or because they fear that any constitutional regulation on abortion procedures will signal the beginning of the end of the right recognized in *Roe*. This Court should give no weight to those dissenting views because Congress has already considered them. *See, e.g.*, 149 Cong. Rec. S3653-54 (daily ed. Mar. 13, 2003) (statement of Sen. Santorum) (providing numerous letters "from specialists in maternal fetal medicine in response to [dissenting views] printed in the Record yesterday"); H.R. Rep. No. 108-58, at 147-54 (discussing the dissenting views of the members of the House Committee on the Judiciary). Indeed, this issue was

heavily debated on the floor of Congress for tens of hours on numerous occasions – both before and after *Stenberg* – and Congress was entitled to conclude that there was no credible medical evidence supporting the need for the D&X procedure.

2. The trial record provides further support for Congress's findings.

The trial court record – which the Eighth Circuit ignored by erroneously treating *Stenberg*'s factual findings as a per se constitutional rule – also establishes that the D&X procedure is never medically necessary. That extremely expansive record contains volumes of support for Congress's findings. For instance, Dr. Watson Bowes, an Emeritus Professor of Obstetrics and Gynecology at the School of Medicine of the University of North Carolina, stated that, based on his experience in performing abortions, "a partial-birth abortion is never medically necessary to preserve the health of a woman." Expert Report of Watson A. Bowes, Jr. at 4, *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004). Similarly, Dr. Charles Lockwood, a Professor and Chair of the Yale University School of Medicine Department of Obstetrics Gynecology and Reproductive Sciences, testified that "D&X specifically is never medically necessary" in post-viability abortions. Expert Report of Charles J. Lockwood at 13, *Carhart*, 331 F. Supp. 2d 805. And in response to arguments that D&X is intuitively safer than D&E (in pre-viability abortions) because fewer instruments pass into a woman's uterus, Dr. Lockwood astutely responded that "anecdote and intuition is [sic] not a sound way to practice medicine: hard data and, preferably, randomized trials are needed. There are [sic] none for D&X." *Id.* at 14.

Additionally, Dr. Curtis Cook, a fetal medicine expert, testified that the D&X procedure is "never medically necessary, in order to safely evacuate a

uterus" and that "it is not even necessarily the preferred method [because] it may entail unforeseen and unnecessary risk both immediately and in the future." Transcript of Record at 1299, *Carhart*, 331 F. Supp. 2d 805. Moreover, Dr. Leroy Sprang, an Associate Clinical Professor at the Feinberg School of Medicine at Northwestern University, testified that "[t]he use of intact D&X . . . is never medically necessary to preserve the mother's health, and is never the best method, because the physician can always safely bring about fetal demise before extracting the fetus." Expert Report of M. Leroy Sprang at 10, *Carhart*, 331 F. Supp. 2d 805. Furthermore, Dr. Elizabeth Shadigian, an OBGYN and Clinical Associate Professor in the Department of Obstetrics at the University of Michigan, testified that, based on her experience in performing abortions and in staying abreast of developments in the abortion field, "there is no basis to say the D&X is safer than any other procedure." Transcript of Record at 1513, *Carhart*, 331 F. Supp. 2d 805.

In short, the trial court record – much like the congressional record – makes clear that the D&X procedure is never medically necessary to protect women's health. Accordingly, no health exception is required under *Casey* and *Stenberg*.

3. If the Court nevertheless perceives some rare circumstance in which it believes the D&X procedure is medically necessary, the proper course is not wholesale invalidation of the Act, but entry of a limiting injunction.

As this Court made clear in *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), "when confronting a constitutional flaw in a

statute, we try to limit the solution to the problem." *Id.* at 967. Where the alleged constitutional infirmity is such that "[o]nly a few applications of [the statute] would raise the constitutional problem," wholesale invalidation is improper. *See id.* at 969. Instead, the Court should seek what the *Ayotte* Court called "a modest remedy" – namely, a declaratory judgment and injunction addressing only those isolated applications in which the alleged constitutional infirmity is present. *See id.*

Here, if the Court believes that there are some circumstances in which the D&X procedure is medically necessary, the appropriate relief would be a partial invalidation of the Act only in those circumstances; the remainder of the Act should remain intact.

B. The Act applies only to the D&X procedure and thus does not impose an undue burden upon a woman's right to make an abortion decision.

1. The Act is limited by its terms to the D&X procedure.

The *Stenberg* Court held that the Nebraska statute "'impose[d] an undue burden on a woman's ability' to choose a D&E abortion" because its definition of a partial-birth abortion prohibited not only the D&X procedure, but also the standard D&E procedure, which is the most common abortion procedure used during the second trimester of pregnancy. *Stenberg*, 530 U.S. at 930 (quoting *Casey*, 505 U.S. at 874). The Nebraska statute defined a partial-birth abortion as a procedure in which a doctor "deliberately and intentionally deliver[s] into the vagina a living, unborn child, or a substantial portion thereof." Neb. Rev. Stat. § 28-326(9). According to the *Stenberg* Court,

this definition did not clearly distinguish between the D&X and D&E procedures. The statute's defect was the ambiguous phrase "substantial portion" of an unborn child. The Court was concerned that the statute might be interpreted to ban a standard D&E procedure in which an arm or a leg is pulled through the cervix as part of the dismemberment process. *Stenberg*, 530 U.S. at 939.

Unlike the Nebraska statute, the Act does not impose an undue burden because it contains a more precise definition of a partial-birth abortion that clearly distinguishes it from other abortion procedures. Prior to *Stenberg*, Congress had passed partial-birth abortion bans that defined the procedure much like it was defined in the Nebraska statute – as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing delivery." *See, e.g.*, Partial-Birth Abortion Act, H.R. 1122, 105th Cong. (1997). After *Stenberg*, however, Congress re-drafted the Act specifically to remedy these definitional defects. Thus, the Act defines a "partial-birth abortion" as a procedure in which a physician "deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother" for the purpose of performing an overt, lethal act upon the fetus and performs that overt, lethal act, 18 U.S.C. § 1531(b)(1)(A)–(B).

The Act's definition of a partial-birth abortion avoids the defects of the Nebraska statute by providing clear anatomic points of reference – the child's navel and head – to distinguish between the D&E and D&X procedures. *Partial-Birth Abortion Ban Act of 2002: Hearing on H.R. 4965 Before the Subcomm. on the Constitution of H. Comm. on the*

Judiciary, 107th Cong. 69–70 (2002) (statement of Dr. Curtis Cook, M.D.). These reference points make clear that the Act does not apply to a standard D&E procedure in which an arm or leg is drawn through the cervix as part of the dismemberment process. *Stenberg*, 530 U.S. at 939.

The *Stenberg* Court indicated clearly that a statute drafted like the Act might be constitutional. *Id.* at 944. In *Stenberg*, the Attorney General of Nebraska urged the Court to interpret the phrase "substantial portion" of the unborn child to mean "the child up to the head." *Id.* at 940. Although the Court ultimately rejected this interpretation because it conflicted with the statutory definition of "substantial portion", it nonetheless stated, "[w]e are aware that adopting the Attorney General's interpretation might avoid the constitutional problem." *Id.* at 944.

Although the Eighth Circuit did not address whether the Act imposes an undue burden, the trial court did consider this issue. It conceded that the Act is "more specific" than the Nebraska statute, but it concluded that the Act imposes an undue burden because it bans an abortion procedure performed by Dr. Carhart, which the court characterized as a standard D&E procedure. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1031, 1033 (D. Neb. 2004). This procedure entails delivering an intact living fetus past the navel outside the woman's body and then dismembering the fetal body rather than removing it intact. *See id.* at 1036. The district court characterized this procedure as a D&E procedure because it involves dismemberment, which the court described as "the hallmark of all D&E abortions." *See id.*

Neither the district court's nor Dr. Carhart's characterization of this procedure as a standard D&E procedure simply makes it so, however. Dr. Carhart's special procedure differs from the standard D&E

(where the fetus is dismembered while still inside the mother) and the intact D&E, or D&X (where the fetus is not dismembered, but rather delivered "intact" after having its skull collapsed) described in *Stenberg*. *See Stenberg*, 530 U.S. at 925-26. Furthermore, contrary to what the district court claimed, the "hallmark" of the D&E procedure cannot logically be dismemberment alone. If it were then it would be oxymoronic to describe a version of the D&E procedure as an "intact D&E." Instead, the hallmark of all D&Es, except the breech extraction version of the intact D&E, i.e., a D&X, appears to be the killing of the fetus inside the mother. Thus, the Act does ban Dr. Carhart's special procedure if it involves delivery of a live fetus past the navel prior to dismemberment. This procedure can be prohibited under *Stenberg* and *Casey* because it is more like a D&X procedure than a standard D&E procedure.

2. Even if the Act is ambiguous, the Court should avoid the constitutional question by reading the Act to apply only to the D&X procedure.

It is a settled precedent that, where possible, this Court will interpret statutes so as to avoid rendering them unconstitutional. As this Court has explained, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute narrowly so as to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499-501, 504 (1979); see also *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring) ("When the validity of an act of Congress is drawn into question, and even if

a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

Here, for the reasons set forth above, the Act is plainly susceptible – and was plainly intended by Congress – to cover D&X abortions, but not D&E abortions. *See* H.R. Rep. No. 108-58, at 6 (explaining that the "definitional objections have been remedied" by drafting the Act's language to be "sufficiently precise so as to exclude the D&E abortion procedure"). Accordingly, this Court should construe the statute narrowly as applying only to the D&X procedure. Moreover, if this Court believes there is any possibility that the Act could be used to prohibit the D&E procedure, the Court can enter an injunction prohibiting its enforcement against the D&E procedure. *See Ayotte*, 126 S. Ct. at 969.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

PHILIP D. MORAN
COLBE MAZZARELLA
265 Essex St., Suite 202
Salem, MA 01970
(978) 745-6085

DWIGHT G. DUNCAN
Counsel of Record
333 Faunce Corner Rd.
N. Dartmouth, MA 02747
(508) 998-9600 ext. 124

GREGORY S. BAYLOR
STEVEN H. ADEN
CENTER FOR LAW & RELIGIOUS
FREEDOM OF THE CHRISTIAN
LEGAL SOCIETY
8001 Braddock Rd., Suite 300
Springfield, VA 22151
(703) 642-1070 ext. 3504

MARY ANN GLENDON
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-4769

Dated: May 19, 2006